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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

JOHN B. SHIELDS, individually and as United States Attorney for the District of Utah, and INTERSTATE COMMERCE COMMISSION,

Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF WM. D. WHITNEY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

WM. D. WHITNEY, *amicus curiae*, as counsel for Hudson & Manhattan Railroad Company.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the brief.

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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OCTOBER TERM, 1938

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned, as counsel for Hudson & Manhattan Railroad Company and with the consent of all the parties, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

WM. D. WHITNEY, *amicus curiae,*
as counsel for Hudson & Manhattan Railroad Company.

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BRIEF OF WM. D. WHITNEY AS *AMICUS CURIAE*

THIS BRIEF RELATES TO PROCEDURE ONLY

This brief will confine itself to suggestion the grounds for sustaining the procedure followed in the courts below. It will not concern itself with the merits of the question whether the respondent is or is not, within the meaning of the Railway Labor Act, a "street, interurban or suburban electric railway" or is or is not "operating as a part of a general steam railroad system of transportation".[1]

[1]It may be, moreover, that this Court will not review that question, in view of the concurrent findings of fact by the two Courts below, *Cincinnati, etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196, *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 542,—and that "the writ of certiorari was not granted to review the particular facts but to pass upon the question[s] of [procedural] principle", as in *Crowell* v. *Benson*, 285 U. S. 22, 65.

STATUS OF THE HUDSON & MANHATTAN

The Hudson & Manhattan Railroad Company, for which this *amicus curiae* is counsel, is the plaintiff in a suit in equity of similar character against the United States Attorney for the Southern District of New York (noticed in *Shannahan* v. *United States*, Oct. Term 1937, No. 502, footnote 5), in which an injunction has been granted in favor of the Hudson & Manhattan, and on which appeal by the United States Attorney and certain intervenors is pending before the 2d Circuit Court of Appeals. The facts in the Hudson & Manhattan's case are wholly dissimilar to those in the Utah Idaho's. But in respect of procedure, the only distinction between the conduct of the two cases is that the Utah Idaho introduced detailed evidence *de novo* before the District Court (albeit the testimony "was in substance a duplication of the testimony before the Commission", *per* opinion of the 10th Circuit Court of Appeals) (R. 332); whereas the Hudson & Manhattan accepted the report of the Interstate Commerce Commission as a final and correct statement of the facts, and contested its conclusions of law only.[2]

STATEMENT OF THIS CASE

The respondent, and other interurban railroads in a similar position, are unquestionably subject to the provisions

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[2]The government's petition for certiorari was, therefore, in error in saying that "each of the lower courts passing upon the question has completely ignored the determination by the Interstate Commerce Commission". See opinion of Judge Woolsey in the *Hudson & Manhattan* case (S. D. N. Y.) 22 Fed. Supp. 105.

either of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. c. 8, amending the Act of May 20, 1926, c. 347, 44 Stat. 577) or of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*). Interstate steam-railroad carriers are subject to the Railway Labor Act, but, in defining the term "carriers" to which it applies, the Act provides

> "That the term 'carrier' shall not include any street, interurban or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power."[3]

The mandatory system of regulation of carriers by the National Mediation Board and the National Railroad Adjustment Board set up under the Railway Labor Act (see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 545) is more closely supervisory and burdensome than the regulation by the National Labor Relations Board set up under the National Labor Relations Act.

The Railway Labor Act provides that the question whether a carrier is within or without the exemption proviso may be referred in the first instance by the National Mediation Board to the Interstate Commerce Commission

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[3]The presence of identical exclusory definitions in the Railroad Retirement Act of 1937 (Act of June 24, 1937, c. 812, 49 Stat. 967, 45 U. S. C. c. 9), the Carriers Taxing Act of 1937, (Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C. c. 11) and the Railroad Unemployment Insurance Act (Act of June 25, 1938, Public No. 722, 75th Congress, 3rd Session) present interurban railroads like this respondent with the identical question as between those statutes and the Social Security Act (Act of August 14, 1935, 49 Stat. 620, 42 U. S. C. c. 7).

for determination, and also authorizes such a determination to be made upon complaint of any party interested. § 1, (First). There is no provision in the statute for judicial review of the Commission's determination.[4]

In this case the National Mediation Board referred the question of the status of the respondent to the Interstate Commerce Commission, which held hearings and rendered a determination that the respondent was not within the exclusory proviso (214 I. C. C. 707) (R. 314).

The statute provides cumulative penalties for non-compliance with its terms, at the rate of $1,000 to $20,000 fine or 6 months' imprisonment for the carrier itself, and for each offending officer or agent; *each day of non-compliance constituting a separate offense,* § 2 (Tenth), and makes it

> "the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *."

Presumably, the United States Attorneys will do their duty; and the District Court has found that the United States Attorney for District of Utah, one of the petitioners herein "has threatened to file suits and prosecute the plaintiff [the Utah Idaho] and its officers and agents for the failure upon the part of the plaintiff to comply with the Railway Labor Act" (R. 66).

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[4] The provisions of the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act are identical.

After the decision in this case by the Interstate Commerce Commission, the carrier refused to post the notice prescribed by the National Mediation Board pursuant to § 2 (Eighth) of the Act (R. 23, 64) and brought suit in equity against the United States Attorney for the District of Utah praying for an injunction against enforcement of the Act. The Interstate Commerce Commission was granted leave to intervene as a party defendant (R. 39). The District Court, after a trial *de novo*, at which the testimony was substantially the same as that before the Commission, found as a fact and as a conclusion of law that the respondent was an interurban electric railway and that the decision of the Commission was "contrary to law" (R. 67, 68). Accordingly, an injunction was entered against enforcement of the Railway Labor Act against respondent by the United States Attorney (R. 68). The decision of the District Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit, with an opinion by Circuit Judge Lewis, concurring opinion by Circuit Judge Williams and dissenting opinion by Circuit Judge Bratton (R. 327).

The District Court opinion is unreported. The Circuit Court of Appeals opinion is reported at 95 F. [2d] 911.

PROCEDURAL QUESTIONS PRESENTED

At the threshold of any suit in equity against government enforcement officers, and in which there has been a prior report by an administrative body, we recognize that the following procedural questions are presented:

(A) Questions relating to judicial review of administrative decisions generally.

(1) Does the determination made by the Interstate Commerce Commission wholly preclude judicial examination of the same question?

(2) If not, shall the re-examination of the question, or the review of the determination, be upon a trial *de novo*, or upon the record before the administrative body or upon the face of its report?

(3) Or is the determination merely advisory or persuasive?

(B) Questions relating to such review by suit in equity for injunction.

(1) Does equity provide the proper forum?

(2) Is the defendant the proper government officer to sue?

We appreciate the importance and independence of each of these questions, and the perils with which the journey of the plaintiff is fraught, for it is settled that if its attorneys have erroneously advised it as to any of these steps, the consequences are fatal to its suit. An apt example is provided by the fate of the Chicago South Shore and South Bend Railroad, whose trustees (Shannahan, *et al.*) chose in respect of this same statute a different procedure from that determined upon by the Utah Idaho and the Hudson & Manhattan; *Shannahan* v. *United States*, 303 U. S. 596.

The *Shannahan* case is determinative that an interurban railroad may not litigate its status under the Railway Labor Act by invoking the provisions of the Urgent Deficiencies Act of October 22, 1913. It remains to determine whether the course followed by the Utah Idaho and the Hudson & Manhattan is the proper alternative. We believe that it is.

The leading cases in this Court which have laid down the great principles of procedural due process have, of course, largely arisen upon a consideration of constitutional questions, predominantly occasioned by an assertion of rights under the 5th and 14th Amendments or by a contesting of jurisdiction consequent upon the division of powers between state and nation. And on the question whether the courts must make an independent examination of the facts determinative of the constitutional questions, this Court has been sharply divided in opinion. But that question is not involved in this case at all, as we have here, not a contest on constitutional grounds, but a problem of interpretation of Congressional enactment, and one which is presented in a setting that calls peculiarly for independent judicial consideration, for it involves a contest between two statutes in the same field of regulation. The question is simply whether the respondent falls within a defined class which the legislature has subjected to the one statute, or is excluded from that class and therefore is subjected to the other. And the exclusory proviso is expressed in a phrase which was taken from prior statutes which had received, in cases presented by other railroad corporations, judicial construction from this Court, so that the statute here presented must be deemed to have adopted that construction.

SUMMARY OF ARGUMENT

I. The determination of the Interstate Commerce Commission does not conclusively subject the Utah Idaho to the Railway Labor Act; and the Utah Idaho is entitled to at least some form of judicial examination of its status.

II. In the absence of any express statutory provision for review, the question of the status of the Utah Idaho under the Railway Labor Act may properly be examined by the court in a proceeding in equity to enjoin enforcement of that Act against the Utah Idaho.

III. In such a proceeding, the re-examination of the question determined by the Commission—or the "review" of that determination—is, in theory, necessarily based upon a new record. However, it may be appropriate, in the interests of comity and because of the deference due to the part played by the Commission, that the record before the court diverge as little as possible from that before the Commission. This desideratum has been fulfilled in the present case, for the District Court reached its decision both upon the evidence before it and, independently, upon the basis of the record before the Commission (R. 67, 68), and, as was found by the Circuit Court of Appeals, the testimony was substantially the same in both cases.

IV. As there is no statutory provision for judicial review, the true rule would appear to be that the Commission determination is without binding effect upon the courts either on the facts or on the law, but is advisory or persuasive only.

V. (1) However, assuming that the findings of the Commission as to the facts involved are binding upon the courts, unless unsupported by substantial evidence or arbitrary or capricious, the ultimate question whether, upon the facts disclosed, the Utah Idaho is or is not an interurban falling within the specific terms of the proviso demands a

construction of the statute, which is a judicial function. It cannot be assumed that Congress intended by mere implication to transfer such a function to the Commission. This is particularly the case, where the construction of the statutory phrase is necessary to resolve a conflict between two statutes, and thereby to determine a conflict of jurisdiction between administrative bodies or officers.

(2) The intrinsic nature of the determination made by the Commission renders it inappropriate to limit judicial review to a consideration of whether the determination lacked substantial evidentiary support or was capricious or arbitrary. The statutory proviso construed by the Commission does not relate to a matter with regard to which a selection may be made in the exercise of administrative discretion. Nor does the statute confer upon the Commission any authority to make a choice among several equally legitimate and proper alternatives. The question is one of divining the intent of Congress in the use of specific terms previously construed by this Court.

(3) The provision authorizing and directing the Interstate Commerce Commission to make a determination under the Railway Labor Act has as its purpose merely to transfer to the Commission (contingent upon a request for a determination) an authority which it could not have had impliedly (since it is not concerned with the administration of that Act), and which otherwise would have rested exclusively with the administrative bodies or officers charged with the application of the Act. The authority thus conferred is the same as that which every government body impliedly possesses to determine whether or not it shall apply to a particular case the statute under which it

acts. Such a determination has no more than perstuasive force.

(4) Uniformity in the construction of the exemption proviso of the Railway Labor Act and identical provisos in other statutes can be secured by recourse to this Court. Moreover, because determinations of the Commission with respect to the application of identical provisos in the Interstate Commerce Act and the Locomotive Inspection Act are not binding upon the courts, there would result a lack of uniformity in the application of identical provisos, if the determinations of the Commission under the Railway Labor Act, the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act should be held binding on the courts. The prerogative of the Commission to render inconsistent decisions would likewise militate against uniformity.

ARGUMENT

POINT I

The determination of the Interstate Commerce Commission does not preclude all judicial consideration of the Utah Idaho's status.

The petitioners do not appear seriously to contend that by decree of the Interstate Commerce Commission the Utah Idaho may be conclusively held to fall outside the scope of the exemption proviso. The point is, nevertheless, made by the government (in sub-division B, at pp. 37-38 of its brief), it being contended that, however unreasonable, arbitrary, capricious and devoid of evidentiary support, the Commission's determination must abide, provided only that it was preceded by a hearing.

The hesitation which must necessarily accompany such a suggestion is well warranted, in the first instance, by the eventual extent of its consequences. Moreover, failing as it does to accord any tangible content to the statutory requirement for a hearing, and buttressed only by two inapplicable cases, the suggestion must fail.

(a) Here we are confronted with two pairs of Congressional enactments, each turning upon the same statutory criterion. The alternatives presented are: *First*, whether the Utah Idaho in its relation with its employees is to be subject to the Railway Labor Act, on the one hand, or to the National Labor Relations Act, on the other; and, *second*, whether it and its employees are to be subject to the Railroad Retirement Act, the Carriers Taxing Act and the Railroad Unemployment Insurance Act, on the one hand, or to the Social Security Act, on the other. In neither case does the answer rest upon administrative action, but in both it derives *directly* from the statutory clause:

> *"Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power".

This proviso, phrased in identical terms, is found in paragraph First of section 1 of the Railway Labor Act, and in section 1(a) of the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937 and the Railroad Unemployment Insurance Act.

Conversely the National Labor Relations Act provides, in section 2(2), that the term "employer" as used therein

"shall not include * * * any person subject to the Railway Labor Act, as amended from time to time."

By virtue of corresponding provisions of the Railroad Retirement Act (§ 17), the Carriers Taxing Act (§ 9a), and the Railroad Unemployment Insurance Act (§ 13a, amending § 907(c) of the Social Security Act), employers subject to those statutes are in effect excluded from the operation of Titles II, VIII and IX, respectively, of the Social Security Act; the Railroad Unemployment Insurance Act, further, relieving such employers from the unemployment compensation acts of the several States (§ 13b-g).[5]

The question that arises in these circumstances is as to what effect Congress intended to give, or as to what effect this Court could recognize that Congress constitutionally included, by the following sentence of the statute (Railway Labor Act § 1, paragraph First):

"The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

The Railroad Retirement Act, § 1(a), the Carriers Taxing Act, § 1(a), and the Railroad Unemployment Insurance Act, § 1(a), all have corresponding provisions, phrased in identical terms with that just quoted from the Railway Labor Act.

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[5] Section 13(b)-(g). See *Steward Machine Co.* v. *Davis*, 301 U. S. 548 and *Carmichael* v. *Southern Coal & Coke Company*, 301 U. S. 495, with regard to the relationship between Title IX of the Social Security Act and the various State unemployment compensation laws.

If is at once apparent that the Congress did not authorize or direct that the Interstate Commerce Commission determine all cases. If the Mediation Board, the Railroad Retirement Board or the Commission of Internal Revenue, as the case may be, should elect to make its or his own determination, and if the railway in question and its employees be content to abide by their determination, the Interstate Commerce Commission would be devoid of power in the premises.

Indeed, the Railroad Retirement Board has adopted a procedure for a determination of the question, under which the Interstate Commerce Commission in many cases will not be entrusted with such power in respect to the Railroad Retirement Act.[6]

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[6]The Regulations under the Railroad Retirement Act of 1937, dated May 31, 1938 (Federal Register, June 23, 1938, Vol. 3, p. 1478, 1480), provide:

"Sec. 2.13. *Electric railways.*—The General Counsel will require the submission of information pertaining to the history and operations of an electric railway with a view to determining whether it is an employer [within the meaning of the statute] and will inquire into and make his recommendations upon the following considerations:

"(a) whether the electric railway is more than a street, suburban or interurban electric railway; or

"(b) whether it is operating as a part of a general steam-railroad system of transportation; or

"(c) whether it is part of the national transportation system.

"If in the opinion of the General Counsel an electric railway has the characteristics set forth in either (a), (b) or (c), he will conclude that it is an employer under the Act and if the operator concurs in such opinion, the decision will be made final by the Board. If the operator does not concur in the conclusion reached the question will be submitted to the Interstate Commerce Commission for determination. (Secs. 1, 10, 50 Stat. 307, 314; 45 U. S. C. Sup. III, 228a, 228j.)"

It seems difficult to contend that a determination of the Commission which may never be invoked, would, when it happens to be invoked, be vested with so unique and extraordinary a sanctity as to shut off resort to the courts. That, on the contrary, the determination of the Commission enjoys only persuasive force, is affirmatively and clearly indicated by certain considerations hereinafter referred to, but exceeding the scope of the present point.

In so far as the immediate question is concerned, aside from the broad domain over which the Interstate Commerce Commission would be set as absolute sovereign, and restricting the discussion to the application of the Railway Labor Act alone, the conception of the Commission's power as absolute is contrary to general principles of law and to the statute itself.

(b) Plausibility forbids the contention that after going through the motions of a "hearing" the Commission has the power beyond recourse to subject a railway to the widespread and complex regulation of the Railway Labor Act and, in consequence, to expand or contract the metes and bounds of the Act as its fancy dictates (subject only to repeal by an Act of Congress). Having such power, the Commission would be clothed in the robes of a court of last resort and would, at the same time be installed as a legislature *pede plano* with Congress. As the sole arbiter of the meaning of the proviso, the Commission would be empowered in effect to amend the Act as it saw fit.

The words of the proviso would be those of Congress, but their content would be, without control, that supplied by the Commission. The terms of the statute circumscribing the scope of its application to certain classes of railroads would be rendered inoperative. Although a standard is pre-

scribed, the absence of any form of adequate judicial review would render such standard meaningless and ineffectual. For Congress to grant this boundless power of determination to the Commission would be to abdicate or to transfer to the Commission the essential legislative functions with which Congress is vested by the Constitution.[7] Moreover, the principle of the separation of powers would also be set at naught in that the Commission would, in the capacity of an independent and uncontrolled judicial body, construe the law and adjudge the status of the railway before it.

But the statute itself precludes any supposition that the Commission may arbitrarily define the relations of carriers with their employees and delimit the bounds of the statute. The provision of the Railway Labor Act which requires a hearing prior to the issuance of a determination by the Commission does not merely direct the Commission to hold a hearing *pro forma* but requires "a hearing in a substantial sense", *cf. Morgan v. United States,* 298 U. S. 468, 481; and, in order to determine whether or not that requirement has been complied with, this Court must at the very least determine whether there was "evidence adequate to support pertinent and necessary findings of fact." *Morgan* v. *United States, supra,* at page 480; *cf. St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92.

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[7] *A. L. Schechter Corp.* v. *United States,* 295 U. S. 495, 529. We do not, of course, attempt to imply that the Commission would exercise its functions unwisely or unfairly in construing the proviso; but the assumption to the contrary does not answer the question. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420.

(c) The suggestion of the petitioners here seeks a basis in two cases decided in a field of law distant from the subject-matter of the present controversy.

The inquiry into the validity of the action threatened by the United States Attorney for the District of Utah and, incidentally, of the order of the National Mediation Board —to the consideration of which the petitioners have interposed the determination by the Interstate Commerce Commission—does not involve one of those "matters arising between the Government and others which from their nature do not require judicial determination and yet are susceptible of it". *Ex parte Bakelite Corporation*, 279 U. S. 438, 451. Such matters, as was noted by Mr. Justice Brandeis in his dissenting opinion in *Crowell* v. *Benson*, 285 U. S. 22, 89, are those

> "ordinarily outside of judicial competence,—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails,—matters which are within the power of Congress to commit to conclusive executive determination".

But it was further pointed out by Mr. Justice Brandeis in the same dissenting opinion (285 U. S. at pp. 87-88, Note 23):

> "That all questions arising in the administration of the Interstate Commerce Act * * * could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed."

The determinations of the Interstate Commerce Commission under the Railway Labor Act are not analogous to those rendered by the Commission under the authority

delegated to it by the Transportation Act of 1920 to determine the amounts of certain payments to be made to carriers who had been under federal control during the World War.[8] *Butte, Anaconda & Pacific Railway Company* v. *United States,* 290 U. S. 127; *Great Northern Railway Company* v. *United States,* 277 U. S. 172. The first of these cases involved section 204 of the Act, providing for the reimbursement to certain carriers of deficits suffered by them during the period of federal control; and the second case involved section 209 of the Act, providing for the payment to certain carriers of amounts necessary to make good the guaranty granted by the Government to those of such carriers who duly filed with the Commission a written statement accepting all the provisions of that section. Both cases, therefore, fall within the category of those in which Congress occupies towards the proposed beneficiaries of bounties, or of compensation for losses suffered from Governmental action, the relationship of a benefactor. *Work* v. *Rives,* 267 U. S. 175, 182. In creating a right in individuals against itself, the United States is, of course, not obliged to provide any remedy in the courts. *United States* v. *Babcock,* 250 U. S. 328; *cf. De Groot* v. *United States,* 5 Wall. 419, 431-433. In any event, it is evident that where a statute grants a payment or confers a bounty in an amount to be determined by a special tribunal, such statute does not provide for a payment in an amount to be determined by the courts. And under sections 204 and 209 the Secretary of the Treasury was authorized to draw in favor of the carrier entitled thereto warrants, not in any amounts specified in the Act, but "for the amount shown in" the certificate of the Interstate Commerce Com-

[8] Act of February 17, 1920, c. 77; 41 Stat. 435, 460.

mission as payable to that carrier,[9] or to make good the Government's guaranty.[10] Had the court assumed jurisdiction to revise the certificates of the Commission, it would indeed have undertaken the function of a disbursing agent. *Cf. Decatur* v. *Paulding*, 14 Pet. (39 U. S.) 495, 516.

In making a determination pursuant to paragraph First of section 1 of the Labor Railway Act, the Commission, it is true, does not exercise a power conferred upon it by the Interstate Commerce Act,[11] and for that reason no review lies under the Urgent Deficiencies Appropriation Act (*Shannahan* v. *United States*, 303 U. S. 596). But in this case the Utah Idaho did not invoke that jurisdiction. It may be observed, however, that the Railway Labor Act was passed by Congress as a measure regulatory of interstate commerce,[12] and the function of the Commission under that Act, while judicial, relates exclusively to such regulation. The Commission here cannot be in any manner likened to the dispenser of a bounty granted by the United States, or to a disbursing agent.

POINT II

Equity provides the appropriate forum for judicial review.

This proposition is not denied, or apparently questioned, by the Government. We find no argument on the part of

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[9]Section 204(g), 41 Stat. 461.

[10]Section 209(g), 41 Stat. 466.

[11]Indeed, it is clear that the present situation is not one in which the Commission exercises its administrative discretion in regulating the operations of railroads.

[12]See *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 553.

the Government that if the question of the Utah Idaho's status is to be considered by the courts at all, the present is not an appropriate form of proceeding in which that may be done. We therefore refer briefly to the question only on the assumption that it may be raised by the Court itself.

The absence of a statutory provision for judicial review necessarily leaves equity as the only "appropriate" forum for determination of the question presented; see dissenting opinion of Mr. Justice Brandeis in *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 294, 295; and *a fortiori* the opinion of Mr. Justice McReynolds for the majority in the same case.

This is not an effort to enjoin the Interstate Commerce Commission, as it is recognized that the Commission did not enter an enforceable order, and that, as already pointed out, the Commission's action constituted

> "merely preparation for possible action in some proceeding which may be instituted in the future."

Compare *Shannahan* v. *United States*, 303 U. S. 596, 599.

The action against which an injunction is here sought, is the imminent prosecution by the United States Attorney. The District Court made a finding of fact that

> "the defendant has threatened to file suits and prosecute the plaintiff and its officers and agents for the failure upon the part of the plaintiff to comply with the Labor Railway Act, and that unless the relief herein prayed for is granted he will do so" (R. 66).

Indeed, under the statute, it is the plain duty of the United States Attorney to institute, upon the application of a duly delegated representative of a carrier's employees, and to prosecute, all necessary proceedings for the enforcement of

the provisions of § 2 and for the punishment of all violations thereof.

And here action had already been taken by the National Mediation Board, in that it had issued an order requiring carriers subject to the Act to post certain notices prescribed by the Board pursuant to § 2 (Eighth) of the Act (R. 23, 35, 64).

Therefore, unless relief be granted in an action of the present character, the severe penalties imposed by the Railway Labor Act for a failure to comply with its provisions will preclude resort to any court for determination of the Utah Idaho's rights. As pointed out in the Statement of Facts, these penalties run at the rate of a $1,000 to $20,000 fine or six months' imprisonment for the carrier itself and each offending officer or agent, *each day of non-compliance constituting a separate offense*. § 2 (Tenth).

The Utah Idaho alleged, and the District Court found, that it refused to comply with the statute,—specifically, that it had failed to comply with an order of the National Mediation Board requiring carriers subject to the statute to post certain notices pursuant to § 2 (Eighth), (R. 23, 64).

The respondent was thereby placed in this impossible position: That either it must obey the statute even though not properly applicable to it, or it must incur the risk of suffering the severe penalties for a violation of the order provided in paragraph Tenth of Section 2.

Yet the facts of this case present a serious question of statutory interpretation and application; if this were otherwise doubtful, it would be established by the concurrent findings of both Courts below in favor of the Utah Idaho on the merits. But under the statutory scheme, resort to the courts for a determination of this question is effectively shut off by the imposition of the heavy and cumulative pen-

alties without the opportunity for judicial review. Accordingly, the principles of *Ex parte Young*, 209 U. S. 123, apply; see also *Helvering* v. *Carter*, reported with *Carter* v. *Carter Coal Company*, 298 U. S. 238, particularly the opinion of Mr. Justice Cardozo at page 341. Indeed, failure promptly to resort to equity would impose upon the railroad the risk of having been held to have waived its rights; *Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651.

Whether the penalty be denominated a tax and be made collectible by the Commissioner of Internal Revenue (as in *Helvering* v. *Carter*, *supra*, 298 U. S. 238), or be recognized frankly as a penalty and be made collectible upon prosecution by the United States Attorney (as here, and as in *Ex parte Young*, *supra*, 209 U. S. 123), is immaterial. In either event, the appropriate relief is by suit in equity against the enforcement officer. There is no ground for suit against the Commission itself or the National Mediation Board, as they lack prosecuting or collecting functions; *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

Reference might be made to *Petroleum Exploration, Inc.* v. *Public Service Commission of Kentucky*, 304 U. S. 209; but that decision is not applicable here, and on several grounds. The penalty in that case was light and noncumulative, and the sole effect of obedience was to subject the corporation to the duty of appearing and giving testimony in litigation; whereas, here the respondent has, in harmony with the decision of the *Petroleum Exploration* case, accepted the obligation to appear and litigate before the Interstate Commerce Commission, without prior resort to the courts.

Obedience to the statute would impose a substantial burden upon the railroad, for not merely would it determine status, but it would subject the road to the burdens of the Railway Labor Act, which are more direct, closely supervisory and burdensome than those imposed by the National Labor Relations Act.

Application of the Railway Labor Act to the Utah Idaho would group it with the great body of steam carriers, at least so far as concerns its labor relations. The point is obviously important, as it was entirely open to the Congress to recognize (as it did) a vital distinction between localized interurban lines and the general national steam railroad system of transportation, at least so far as the media for regulation of labor relations were concerned. Such considerations are brought into clear relief by the provision, peculiar to the Railway Labor Act, of a so-called National Railroad Adjustment Board to "consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope * * *", § 3 (First) (a). The Congress obviously had a reasonable basis for determination that localized interurbans and their employees might not find adequate and appropriate representation on a board thus to be dominated by the major carriers and the organizations, "national in scope", of their employees. And equally reasonably, the Congress may have desired to discourage the extension to local suburban railways of any nation-wide strike, lockout, or other labor trouble, that might develop on the lines of the general steam railroad system of transportation.

POINT III

The nature of the record upon which the court of equity shall determine the question.

This question does not arise at all in the *Hudson & Manhattan* case, as the only record before the court in that case was the *report* of the Commission itself. In other words, the Hudson & Manhattan accepted as conclusive the factual description of the Railway Company contained in the report, and took the position (accepted by the District Court, 22 Fed. Supp. 105) that the Commission committed error of law on the face of the report.

But we do not understand from the Government's brief that it seriously argues that the present case should be reversed merely because there was a trial *de novo* below on a new record. With this view we agree.

Theoretically, in the absence of statutory provision for judicial review, there must necessarily be a new record of some sort before the court. Nor would there be reasons, in the absence of express statutory provision, for the adoption of a rule that no evidence will be permitted other than the actual record before the Commission. See *United States v. Idaho*, 298 U. S. 105, 109:

> "Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony."

The problem is not as to the *form* of the record, but as to the degree of weight to be accorded by the courts to the Commission's determination. Comity of one branch of the government toward the other, and specifically the deference owing to a determination by the Interstate Commerce Commission, may render it at times desirable that the courts

should confine their examination of the question to matters presented at the hearings before the Commission; but as the suit is plenary in form, there is no room for a *rule* that the court record shall be so confined. And indeed, such a rule would work serious injustice in a case in which the Interstate Commerce Commission may have erroneously excluded relevant evidence, for as the proceeding is not one for statutory review, the courts lack any power to send the case back to the Commission for further investigation and findings of fact.

The courts below in the present case did not *in substance* go beyond the record before the Commission. The District Court, in its second conclusion of law (R. 67), expressly held that the evidence introduced at the hearing before the Commission showed that the Utah Idaho falls within the terms of the exemption proviso and that, in arriving at the opposite conclusion, the determination of the Commission "is contrary to and is against the law" (R. 68). And the Circuit Court of Appeals found that the testimony before the District Court "was in substance a duplication of the testimony before the Commission" (R. 332). Hence the present case has been decided upon the record before the Commission, as well as upon the evidence before the District Court; and, further, the decision was, *in effect,* confined to the facts subjected to the scrutiny of the Commission.

POINT IV

The Commission's determination, however persuasive, is without any binding force in the courts.

For the reasons mentioned in POINT III, *supra,* neither the Hudson & Manhattan nor the Utah Idaho really needs to advance this contention. As to the Utah

Idaho, the decisions below rested upon substantially the same record that was made before the Commission, and the District Court (whose decree was affirmed in full by the Circuit Court of Appeals) expressly found that the Commission erred. As to the Hudson & Manhattan, the question does not arise at all, because the Commission's statement of operative facts upon the face of its report was in that case accepted as correct.

However, it appears to us to be irrefutable, at least in logic, that the Commission determination, however persuasive, is without any binding force in the Courts. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, where there had been a prior Commission determination involving precisely the same type of question under a prior statute containing the same definition with which we are here concerned, this Court did not hold that the Commission determination was entitled to binding force in any respect.

For the same reason that a railway in the position of this respondent is prevented from seeking a review of the Commission's determination (*Shannahan* v. *United States*, 303 U. S. 596), it appears to follow that the Commission's determination should be without binding force in any respect in a judicial proceeding. There is a certain inequality apparent in the conception that a citizen may not directly review a determination adverse to him by one of the branches of the executive department, and yet may be confronted by that determination in another proceeding. And not merely confronted, but advised that that determination is actually binding upon him (although he could not review it), or at least is binding upon him unless plainly arbitrary.

It seems logically to follow from the decision of this Court in the *Shannahan* case that the Commission's determination is without any more than persuasive force in a case such as the present. The ground of the *Shannahan* decision was evidently that the Commission's determination was not an order, could not be enforced, and was merely preparatory to other action. In other words, the holding was that the Commission's determination had no direct incidence upon the respondent. But if the Commission's determination was without effect upon the respondent, would it not appear to follow that respondent should be immune from having, in a different proceeding, an effect attributed to that decision?

We turn now to an assumption *arguendo* that some weight is to be accorded to the Commission's determination, in other words to an assumption that this case is to be treated in the same way *as if* it were a judicial review of Commission action, and on that assumption to consider the question of the weight to be accorded by the courts to the Commission's determination.

POINT V

In any event, the meaning of the exemption proviso of the Railway Labor Act presents a question for decision by the Court.

Assuming that we were right in POINT I, and the Government wrong in its argument in Subdivision B of its brief at pages 37-38, that is to say, assuming that this statute does not have the effect of completely ousting the courts of jurisdiction, and further assuming that we were wrong in our argument in POINT IV that the determination

by the Commission under the statute is without any binding force in the courts, there remain for delimitation the respective functions of the Commission and of the courts. To what extent is the Commission's determination binding?

The important problem presented in this class of cases appears to us to be as to where to place the boundary line between facts and law. The bulk of the argument in the Government's brief is to the effect that the Commission's determination is binding unless arbitrary, capricious or not based upon substantial evidence; and on this principle we do not find ourselves in disagreement with the Government, so long as it is confined to determinations of fact and not of law. The heading of the Government's point ("A" at p. 18) is expressed more broadly; but throughout the argument which follows (pp. 18-37), we find no authority, or indeed serious argument, to the effect that the rule applies to determinations by the Commission other than determinations of fact. For example, the Government quotes from the opinion of Mr. Justice Brandeis to this Court in the *Shannahan* case, 303 U. S. 596, 599, to the effect that

> "The function of the Commission is limited to the determination of a fact".

The Government draws from this the inference that this Court intended to adopt a rule that the interpretation of the statutory phrase was itself a determination of fact. We do not understand that the Court intended to overthrow the fundamental principle of the division of function between administrative bodies and the courts, or to withdraw from the courts the ultimate responsibility for the interpretation and application of statutory phrases. The quoted statement in Mr. Justice Brandeis's opinion was merely introductory to the decision that the Commission does not, under

this statutory scheme, enter a "reviewable order". In thus drawing the distinction between the preliminary determination of fact by the Commission and the entry of an order, Mr. Justice Brandeis could not have intended to imply that all of the reports and opinions of the Commission necessarily constitute determinations of fact only, as distinct from determinations of law, with the effect of shutting up resort to the courts otherwise than in accordance with the rules established for judicial review of findings of fact. The confusion, if confusion there be, arises out of the many meanings of which the word "fact" is susceptible.

(1) The Construction of the Proviso in Paragraph First of Section 1 of the Railway Labor Act Presents a Question of Law for the Independent Judgment of the Courts.

Whether or not the Utah Idaho falls within the proviso in Paragraph First of § 1 of the Railway Labor Act is a question of statutory construction, and, therefore, a question of law.[13] Indeed, substantially the same question as that here presented has been referred to by this Court as one of law. In *United States* v. *Chicago North Shore & Milwaukee Railroad Company,* 288 U. S. 1, the question was whether the railroad fell within the exemption proviso of Section 20a of the Interstate Commerce Act which is identical in substance with the exemption proviso of the

[13] *Texas & Pacific Railway Company* v. *Interstate Commerce Commission,* 162 U. S. 197, 210; *Illinois Central Railroad Company* v. *Interstate Commerce Commission,* 206 U. S. 441, 457; *Lehigh Valley Railroad Company* v. *United States,* 243 U. S. 412, 414; *Great Northern Railway Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 290, 292; *cf. Ann Arbor Railroad Company* v. *United States,* 281 U. S. 658, 666. Compare also the statement of this Court in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 109.

Railway Labor Act. This Court evidently approved the action of the District Court, by which that court,

> "after making detailed and elaborate findings of fact, concluded as matter of law that the railroad was an independently operated electric interurban railway expressly excepted from the requirements of the section" (288 U. S., at p. 6).

The courts below were not precluded from examining that question by reason of the preliminary determination of the Interstate Commerce Commission, for it is the function and duty of the courts to make the ultimate determination of any question of law involved in proceedings before the Commission.[14] The necessity of a judicial determination of the particular question of law here presented is emphasized by the fact that the statutory provision to be construed is not of a minor or incidental nature, but involves the applicability to the Utah Idaho of the Railway Labor Act in its entirety. Upon the meaning of the words in the statute hinges the question whether, in its relation with its employees, the Utah Idaho shall be subjected to what may be termed the common or general law of the National Labor Relations Act or to the special and more rigorous regime provided for by the Railway Labor Act.

The proposition that the construction of the terms of a statute is a matter of law is, indeed, only the most evident instance of the broad principle that

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[14] *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Tap Line Cases*, 234 U. S. 1; *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185; *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, 236; *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, 256-257. Compare the statement of this Court in *United States* v. *Dickson*, 15 Pet. 141, 162.

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." (*Great Northern Railway Company* v. *Merchants Elevator Company, supra*, 259 U. S. at p. 291).[15]

It is almost supererogatory to add that to construe the statutory provision and apply it to specific facts is a function—indeed, the essential function—of the judiciary.

In *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, there was presented a close parallel to the present situation. That case involved the question whether a proposed trackage constituted an extension subject to the jurisdiction of the Interstate Commerce Commission under paragraphs (18) to (21) of section 1 of the Interstate Commerce Act, or whether it was excepted therefrom by paragraph (22) of that section, as an "industrial track".[16] The question was held to be one of law and open to decision by the court, notwithstanding the fact that the Commission itself was en-

[15]The power reserved to the Commission to determine whether or not technical words in a tariff were used in a peculiar sense (*cf. Texas & Pacific Railway Company* v. *American Tie & Timber Co., Ltd.*, 234 U. S. 138) does not present a question of construction, as was pointed out in the *Great Northern* case, *supra* (259 U. S. at p. 292). In the present case there is a pure question of statutory construction—of construction moreover of terms previously defined by decisions of this Court (see further argument hereinafter). Compare *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 235, 238, referring to the construction of words in a tariff as "a simple question of law".

[16]Paragraph (22) likewise withdraws interurban and similar electric railways from the Commission's authority, for the purpose of paragraphs (18) to (21) of Section 1, in terms substantially identical with those used in the proviso of paragraph First of Section 1 of the Railway Labor Act.

titled to determine it incidentally, in considering an application for a certificate of public convenience to construct such trackage. Compare *Smyth* v. *Asphalt Belt Railway Co.*, 267 U. S. 326, 328-9; *United States* v. *Idaho*, 298 U. S. 105, 109.[17]

The Commission's determination in the present type of case has certain characteristics which have been recognized as peculiarly within judicial cognizance. Thus, as already pointed out, the ultimate determination of the status of the respondent railway company resolves a conflict between two groups of statutes,—the National Labor Relations Act versus the Railway Labor Act, and the Social Security Act and the several State unemployment compensation laws versus the Railroad Retirement and allied Acts.[18]

Moreover, the case presents a challenge to the jurisdiction of the National Mediation Board and of the United States Attorney. *United States* v. *Idaho*, 298 U. S. 105, 110. Here the question whether the respondent railway is an interurban, and whether it is part of a general steam railroad system of transportation, "is a mixed question of fact and law" necessarily left for final decision by the courts. An erroneous determination by the Commission

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[17]The fact that paragraph First of Section 1 of the Railway Labor Act gives to the Commission an initial authority of incidental determination of jurisdiction which, in the absence of that provision, could have been exercised only by the National Mediation Board, does not alter the character of such determination and cannot be interpreted as transferring judicial powers from the courts to the Commission. See further argument *infra*.

[18]*Cf. Marbury* v. *Madison*, 1 Cranch. 137, 178: "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

would result in action by the National Mediation Board "in excess of its jurisdiction" (*United States* v. *Idaho*, at p. 109), and then in action by the United States Attorney in excess of his jurisdiction. Such a decision could not be regarded as a mere error of fact. It cannot be assumed that the statute by its mere silence transferred the function of making that decision from the courts to the Commission.

(2) The Function of the Interstate Commerce Commission in Making a Determination of Status Under the Railway Labor Act is Not an Exercise of Regulatory Power or Administrative Discretion; and the Rules Relating to Judicial Review of Regulatory Action and Administrative Discretion Are Inappropriate in the Present Situation.

The nature of the question determined by the Interstate Commerce Commission in the present case differs inherently from that of the questions involved in the cases holding that findings of the Commission therein considered were reviewable only if they lacked the support of substantial evidence. And the nature of the authority conferred upon the Commission by the Railway Labor Act is essentially different from the authority exercised by the Commission in those cases.

In the Railway Labor Act, Congress has, in definite and mandatory terms, excluded a specific category of railways from the scope of that Act. The exclusion is not a privilege granted by Congress to certain railways. Nor is it a privilege which any administrative body has been given the power to dispense. The so-called "exemption" proviso specifically circumscribes the Railway Labor Act's field of operation. A railway which falls within the proviso is *excluded* from the Act. It could not, assuming that it wished to do so, subject itself thereto by merely refraining from seekng an exemption.

The exemption proviso was phrased in terms substantially identical with those clauses which had already been construed by this Court under Section 1(22) of the Interstate Commerce Act (*Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299) and under section 20a of that Act (*United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1). The phrase "street, suburban or interurban electric railway" was not a novel one, but in one or more of its parts, had been for many years the subject of judicial interpretation.[19] The proviso is couched in plain language, without technical significance.

The import of the proviso is not controlled by words of degree or measure opening a field of interpretation within which administrative discretion necessarily would play. Its application presents the clear-cut question whether or not the words apply to a given class or set of circumstances. The question is qualitative and not quantitative.

Nor does the Railway Labor Act endow the Interstate Commerce Commission with authority to exercise administrative discretion. No power exists in the Commission to extend the application of the Act to a situation to which it deems the Act appropriate or to restrict the Act when, in the opinion of the Commission, questions of policy or expediency make it desirable to do so. The Commission has no power to grant or deny an exemption under the Act.

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[19] *Cf. Omaha & Council Bluffs Street Railway* v. *Interstate Commerce Commission*, 230 U. S. 324, holding that passenger street railways were not railways within the meaning of the Interstate Commerce Act.

No action on the part of the Commission is necessary to bring any right under the Act into existence.[29]

Thus, the question presented under the exemption proviso, and the authority conferred upon the Commission with regard to that question, differ entirely from the questions and authority involved in cases of reasonable rates, unjust discrimination or undue preferences, where the findings of the Commission are findings of fact and are binding upon the court, if supported by substantial evidence, or where preliminary resort must be had to the Commission prior to a judicial proceeding.

The function of the Commission under the Railway Labor Act is, of course, a judicial and not a legislative one,

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[29]It is in essence not in the nature of an "administrative question" as that term was used, for example, in *Northern Pacific Railway Company* v. *Solum*, 247 U. S. 477, 483. See *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, 273. A contrast with the present situation is found in the *Chicago Junction Case*, 264 U. S. 258, 264. Section 5(2) of the Interstate Commerce Act, involved in that case, provided that the Commission should make an order allowing the acquisition of control by one carrier over another "whenever the Commission is of opinion, after hearing" that this would be "in the public interest". The distinctive characteristics of that provision are that: (a) the term "public interest" inherently carries with it questions of expediency, propriety and desirability; (b) the word "opinion" implies the necessity of exercising discretion and choice; and (c) the condition of the right of a carrier to acquire control over another is not the existence of public interest but the opinion of the Interstate Commerce Commission with regard thereto. In this, and the other instances referred to hereinafter, the quasi-judicial power exercised by the Commission is inextricably intermingled with and subordinated to its legislative powers. Compare *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, decided under the Meat Inspection Act, Act of June 30, 1906, c. 3913, 34 Stat. 669, 676, 678.

for it involves merely a question of statutory construction upon the basis of existing facts and does not, directly or indirectly, involve the adoption of rules or regulations for the future. But, aside from the characterization of the Commission's function as *quasi-judicial*, the underlying nature of the matters involved precludes the restriction of judicial review to the confines appropriate where propriety in the exercise of discretionary power is in issue:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those

presented when the construction of any other document is in dispute." (*Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285, 291 (1922).) [Underscoring ours.]

Where the question is one of rates or practices, a broad field of action is implicitly and necessarily given to the Commission within the bounds of which it may choose between various alternatives.[21] Any one of a large number of rates may be reasonable, even if only one may be the best. Various types and degrees of discrimination may exist without it being possible to say as a matter of law whether or not they are unjust. Within limits set far apart, a judgment as to whether a preference is undue must necessarily rest in opinion, and be based upon a selection, informed by experience.[22] As was pointed out by Mr. Justice

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[21] This characteristic is particularly striking where the action of the Interstate Commerce Commission under review involves the structure of a rate schedule, as in *Mississippi Valley Barge Company* v. *United States*, 292 U. S. 282, or an order of state-wide operation, governing a vast multitude of rates, as in *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, or, again, where the decision of the Interstate Commerce Commission is based in large part upon prognostication of its future effects. Compare *Florida* v. *United States*, 292 U. S. 1. As to other cases of rate fixing, under statutes other than the Interstate Commerce Act, see *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426; *Morgan* v. *United States*, 298 U. S. 468.

[22] See, for example, *Seaboard Air Line Railway Company* v. *United States*, 254 U. S. 57. There the question was whether the Commission was correct in regarding a service rendered by certain carriers as "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" (underscoring ours), within the meaning of section 2 of the Act to Regulate Commerce (42 Stat. 379).

Brandeis in *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, 481-482:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887; c. 104, 24 Stat. 379, 380) renders unlawful any *'undue or unreasonable'* preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended § 15 (36 Stat. 551) it is rates, regulations, or practices that in the opinion of the Commission are *'unjustly* discriminatory, or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied."

The very nature of the adjectives grants to the Commission a power of choice to be exercised within certain limits. It requires a consideration of various factors of desirability and propriety.

> "* * * * where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for

damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited." (*Mitchell Coal and Coke Company* v. *Pennsylvania Company*, 230 U. S. 247, 257.)[22]

But, in the present case, once the facts bearing upon the status of an electric railway have been ascertained and collated, there remains only a question of law, whether the terms of the exemption proviso were intended by Congress to apply to that situation. True, there may be doubt and difference of opinion, but there is only one correct solution. The mistake, if there is one, is a mistake of law. The bournes of discretion existing in other cases here resolve themselves into one line. The proviso does not provide for the exemption of "reasonably" interurban electric railways.

The question here being one of determining the intent of a specific statutory proviso, the limitation of judicial review would distort the clear purport of the Act, for it would render exemption dependent upon affirmative action of the Commission rather than upon the operation of the law itself.

Conceivably, the Congress might have provided that all railroads should be subject to the Act excepting only those which, in the opinion of the Commission, were so divorced

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[22]Compare *Interstate Commerce Commission* v. *Alabama Midland Railway Company*, 168 U. S. 144, 170; *Seaboard Air Line Railway Company* v. *U. S.*, 254 U. S. 57, 62.

from the general system of steam-railroad transportation that their operations do not affect the functioning thereof."[24] Under that provision, it would also have been necessary as a practical matter to make exemption dependent upon action by the Commission.[25]

It would be supererogatory to mention the innumerable provisions upon which Congress could have modeled a provision conferring discretionary administrative powers to the Commission under the Railway Labor Act. Indeed it would have been superfluous to seek analogies in the statute books. The Interstate Commerce Commission in its Annual Reports to Congress had formulated proposed amendments to the Interstate Commerce Act, which, if adopted, would have granted to the Commission powers, in connection with the exemption provisos of sections 1 (22), 15a and 20a of that Act,[26] similar to those which it now seeks to arrogate to itself under a provision of the Railway Labor Act which differs so obviously from those proposed amendments that it is almost an express negation of the discretionary powers previously sought by the Commission.

The reports of the Commission made in the years 1928, 1929, 1930, 1931 and 1932 recommended:

> "That the present exemption provisions of paragraph (22) of Section 1, Paragraph (1) of section 15a, and paragraph (1), of section 20a, applica-

[24]Compare the *Chicago Junction Case, supra*, 264 U. S. 258.

[25]See, for example, *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464.

[26]As has been noted, sections 1 (22) and 20a set forth exemption provisos substantially identical with that of the Railway Labor Act. Section 15a (the so-called recapture provision, repealed in 1933) was somewhat broader in scope.

ble to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways, and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned." [Underscoring ours.][27]

The Congress did not avail itself of the opportunity to ut in these or any comparable terms discretionary power he Commission under the Railway Labor Act. On the rary, the Commission has been given no authority to umscribe the operation of the proviso, "the law, and the discretion of the commission, determining the rights he parties."[28]

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[27] 42nd annual report of the Interstate Commerce Commission dated December 1, 1928, p. 83 (R. 252). Identical mmendations were made in the 43rd annual report dated ember 30, 1929, p. 89 (R. 252); the 44th annual report d December 1, 1930, p. 69 (R. 255); the 45th annual rt dated December 1, 1931, p. 122 (R. 256); and the 46th ual report dated December 1, 1932, p. 102 (R. 256). No mmendations with respect to further legislation were le in the 47th and 48th annual reports (R. 257, 258); but same recommendation (applying only to sections 1(22) 20a) again appears in the 49th annual report, dated ember 1, 1935, pp. 97-98 (R. 260). As has been noted, ion 15a was repealed prior to 1935. The significance of e recommendations by the Interstate Commerce Commis- is further considered hereinafter.

[28] *East Tennessee, Virginia and Georgia Railway Co.* v. *erstate Commerce Commission*, 181 U. S. 1, 12.

(3) The Determination of the Interstate Commerce Commission Is Merely the Equivalent of One Which Any Government Body Impliedly Possesses to Decide upon the Applicability of a Statute Administered by It.

In assuming, as we have done, that the action of the Interstate Commerce Commission, in making a determination under the Railway Labor Act, restricts to any extent the function of the courts to construe the exemption proviso, we have provisionally acceded to a complete misconception of the purpose and effect of the provision permitting such a determination to be made, namely: to the view that the Commission has been entrusted with a function formerly vested in the courts and, in addition, with a discretionary power to apply a statute which it does not administer.

The stature of the provision in question is, however, far more modest. It provides an expert advisory body to which application may be made for assistance in ascertaining the meaning of the exemption proviso. But neither the Board nor any one else is required to resort to the Commission. The Commission itself cannot act upon its own motion in the matter. Even when its services are invoked, it is devoid of authority to grant or deny any form of relief. The exemption of an electric railway is made to depend not upon any action of the Commission but upon the terms of the statute.

In the absence of any express provision in the law, the National Mediation Board would have been faced with the necessity of construing the exemption proviso without the effective assistance of the Interstate Commerce Commission. The authority to make the initial determination of status would, in that event, have been vested in the Board

by implication—and that authority would have been the same in nature and effect as the power which the Commission itself possesses and exercises in the administration of those sections of the Interstate Commerce Act and the Locomotive Inspection Act which set forth substantially identical exemption provisos.[29] To permit reference of the question of status to the Interstate Commerce Commission—to transfer this implied power of incidental, initial, determination to the Commission—an express provision was, of course, necessary. And the language of the provision actually set forth in the Act is precisely adapted to effectuating that purpose without conferring upon the Commission any power in addition to the implied authority which an administrative body always exercises in applying to specific situations the statute under which it acts.[30] The Commission may be called upon to aid in the interpretation of definite statutory terms, but has no discretionary authority to accommodate those terms in accordance with its views as to the propriety or desirability of applying the Act in a particular instance.

In these circumstances, the attempt to invoke *the absence of any express provision for review* for the pur-

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[29] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1; *cf. Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, 272; *United States* v. *Idaho*, 298 U. S. 105.

[30] Indeed, the provision in question does not even deprive the National Mediation Board entirely of its power to make initial determinations, but only provides for the *eventual* exercise of that power by the Commission. Nor does the provision expressly require the Board to abide by the determination of the Commission.

pose of clothing the Commission with an authority greater than that which it exercises in construing similar provisos under the Interstate Commerce Act, is to erect a monumental conclusion upon a fragile pedestal. The attempt rests upon the assumption that by mere silence the Congress intended to transfer to the Commission powers previously reserved to the courts and that an established principle was by implication repealed.

Indeed, when considered in the light of certain extrinsic circumstances (to some of which passing reference has already been made), this innate weakness is further aggravated.

From 1928 through 1932, and again in 1935, the Commission besought Congress in its annual reports to grant to it, for the purposes of the Interstate Commerce Act, the very power which the Commission now claims to have received from the silence of the Railway Labor Act. Despite the earnest endeavors of the Commission, the Congress never amended Sections 1 (22), 15a or 20a of the Interstate Commerce Act in the manner desired by the Commission.

And, as has been noted, neither the Railway Labor Act, nor any of the other acts similarly referring identical exemption provisos to the Interstate Commerce Commission, provides for the exercise of administrative discretion by the Commission, or makes the operation of the exemption proviso dependent upon the opinion or any action of the Commission.

And yet, under the view proposed by the petitioners, the Commission would enjoy greater discretionary powers in delimiting the scope of statutes with the administration of which it has no direct concern, than it has in determining

the extent of application of sections 1 (22) and 20a of the Interstate Commerce Act and section 1 of the Locomotive Inspection Act, the administration of which is entrusted to the Commission itself. In no instance in which the power of initial determination rests impliedly with the Commission has Congress seen fit to augment that power by attempting to diminish the province of the judiciary.

In the resulting scheme of things, the Commission would have the greatest powers of discretion in those very instances in which the exercise of discretion by it would be the least appropriate. For, if it was intended that the exemption proviso should be rendered flexible by the injection of considerations of policy, then those questions of policy would more properly have been left to the administrative bodies or officials under whose guidance the Railway Labor Act and other acts similar thereto in this respect are enforced. Questions of policy would frequently be affected by the purposes of the particular statute.

The power of determination which the Railway Labor Acts transfers to the Interstate Commerce Commission thus appears as the equivalent of the authority which the National Mediation Board alone would implicitly have, were permission not given to consult the Interstate Commerce Commission in this matter. It is, indeed, much the same determination which the United States Attorney would necessarily make before bringing suit to enforce the penalties under section 2 of the Act.

The courts are not divested of any part of their power, relieved of any part of their duty, to construe the statute in the light of all the evidence available, merely because the body or official administering the statute has seen fit to attempt its enforcement in a particular case. Neither the

issuance of an order nor the bringing of suit can preclude a judicial determination of the validity of the order or the merits of the suit.

(4) Judicial Review of the Determinations of the Interstate Commerce Commission Tends to Insure Uniformity of Construction.

The contention that a determination by the Interstate Commerce Commission under the Railway Labor Act must be final and conclusive upon the courts in order to assure uniformity of that proviso and similar provisos in other acts[21] assumes three fallacies; namely, (a) that only the Interstate Commerce Commision can divine the meaning of the words used by Congress and sound the hidden depths of the proviso; (b) that the decisions of this Court independently interpreting sections 1 (22) and 20a of the Interstate Commerce Act no longer determine the extent of judicial review in cases involving those sections;[22] and (c) that the Commission will not avail itself of its prerogative of rendering inconsistent decisions.[23]

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[21] Interstate Commerce Act, sections 1(22), 20a and 26; Locomotive Inspection Act, section 1, 43 Stat. 659, U. S. C., Title 45, section 22; Railroad Retirement Act of 1937, section 1, 49 Stat. 967, U. S. C., Title 45, section 228a; Carriers Taxing Act of 1937, section 1, 50 Stat. 435; Railroad Unemployment Insurance Act, Public No. 722, approved June 25, 1938, 75th Congress, 3d Session.

[22] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1. Compare *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266; *United States* v. *Idaho*, 298 U. S. 105.

[23] *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Virginian Railway Company* v. *United States*, 272 U. S. 658, 663.

This Court in *Great Northern Railway Company* v. *Merchants Elevator Company, supra,* 259 U. S. 285, has already answered the argument that judicial review is destructive of uniformity. In that case it was contended that, in the interests of uniformity, preliminary resort must be had to the Commission in a disputed question of construction of a tariff. Rejecting that contention, this Court said:

> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." (259 U. S. at pp. 290-291.) (Underscoring ours.)

The question whether a railroad falls within the terms of the exemption proviso is not so obscured by innumerable technical details that the courts are helpless to construe the meaning of the law. This Court has already construed identical provisos in *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission,* 286 U. S. 299 and *United States* v. *Chicago North Shore & Milwaukee Railroad Company,* 288 U. S. 1.

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[11]Indeed, the Commission itself recognized the authority of this Court by following its decision in the latter case, in

The limitation of judicial review in the case of determinations made by the Commission under the Railway Labor Act would in some cases result in the imposition of a dual status upon certain railways, since the determination of the Commission under the Railway Labor Act could be ignored only if it were unreasonable, arbitrary or capricious and since, on the other hand, similar determinations by the Commission under sections 1 (22), 20a and 26 of the Interstate Commerce Act and under section 1 of the Locomotive Inspection Act would remain open to full judicial review."

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holding that the Chicago North Shore & Milwaukee Railroad falls within the exemption proviso of the Railway Labor Act, notwithstanding the Commission's previous determination to the contrary under section 20a of the Interstate Commerce Act. *United States* v. *Chicago North Shore & Milwaukee Railway Company*, 219 I. C. C. 135.

[55] *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1; *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266 and *United States* v. *Idaho*, 298 U. S. 105.

If, for example, this Court should now hold that the determination of the Commission with respect to the status of the respondent under the Railway Labor Act is binding upon it in the absence of unreasonableness, arbitrariness or capriciousness, and that the action of the Commission in making such determination was, although erroneous, not open to attack upon those grounds, the respondent would be excluded from the exemption proviso of the Railway Labor Act. But, if hereafter the respondent should construct an extension without securing a certificate of public convenience pursuant to section 1(19) of the Interstate Commerce Act, and a proceeding should be brought by the Interstate Commerce Commission to enjoin such construction, pursuant to paragraph (22) of that Act, this Court might find that the initial determination of the Interstate Commerce Commission under section 1(22) was erroneous, and, accordingly, hold the Utah-Idaho exempt.

And within this very group of statutes the National Mediation Board may invoke the determination of the Commission while the Railroad Retirement Board reaches its own contrary determination; or *vice versa*.[22]

Moreover, under the doctrine that the Commission is not required to be consistent in its decisions, an electric railway could not rely upon a doctrine of *stare decisis* for any assurance that it would be placed in the same category under each of the acts in which the construction of the exemption proviso may be referred to the Interstate Commerce Commission. Nor would it be possible to prognosticate with any degree of certainty, from an examination of previous cases decided by the Commission, whether or not a particular electric line of railway falls within the exemption proviso.

The application of that doctrine to the present situation would obviously lead to havoc in the administration of the Railway Labor Act; and the carefully defined category described in the exemption proviso would become fluid and elusive. A single statutory clause would have many shift-

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[22]That this idea is not far-fetched is indicated by the experience of the Hudson & Manhattan which, after suing for an injunction against enforcement of the Railroad Retirement Act, was met by an answer filed on behalf of the Railroad Retirement Board in which that Board pleaded that proceedings under the Railway Labor Act were without relation to the Railroad Retirement Act, that the Board was not a party to the Railway Labor Act proceedings, that the Board is without any official function or duty requiring it to take cognizance of said proceedings, etc. (*Hudson & Manhattan Railroad Company* v. *Latimer et al.*, Dist. of Col., Equity No. 65706.)

ing meanings."[27] While economic conditions and multifarious factors, by their constant flux, may continually alter the reasonableness of rates and practices, a change of sufficient extent and importance to alter the status of an electric railway under the exemption proviso of the Railway Labor Act (or of similar provisos in other statutes) is hardly one that will occur at frequent intervals.

But the government suggests that the effect of our argument is to render the Commission's determination nugatory. We cannot accept this counsel of despair. Even if there be a trial *de novo* upon evidence in addition to that submitted to the Commission, the function of the Commission remains an important one. For one thing, the party relying upon the Commission's determination will be entitled to introduce the report in evidence; and there will be indeed few courts that will fail to give due respect to that report.[28] Moreover, many instances will arise in which the determination of the Commission will convince all the parties concerned. This corresponds to the usual situation

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[27]The argument that it would be more expedient, because more rapidly conclusive of the status of electric railways, to clothe the Commission with power of final determination thus falls to the ground, for if no set criterion is provided, the electric railways would become protean, and, like Alice in Wonderland, would be unable to predict their stature from one moment to the next. It should be added, however, that in one case at least the Commission itself has recognized the necessity here of departing from the rule which permits it to indulge in inconsistency. See *Chicago North Shore & Milwaukee Railway Company*, 219 I. C. C. 135.

[28]An example is found in the present case, where the Court made separate conclusions of law on the basis of the Commission's record and, in addition, with regard to the correctness of the determination itself (R. 67, 68).

in which a controversy has been decided initially by a district court, and in which the defeated parties have elected not to appeal.

The usefulness of the provisions in question is even more obvious if a presumption of correctness attaches to the Commission's determination. In this event, to contend that the provision serves no useful purpose is, in effect, tantamount to rendering superfluous the many statutory provisions and court decisions which in appropriate cases confer the force of *prima facie* evidence upon the reports, findings and orders of administrative bodies.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the Brief.